IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JERRY SMITH — PLAINTIFF

vs. — Civil Action No. 1:97cv239-D-D

THOMAS LIGHTING, a division of
Thomas Industries Holdings, Inc. — DEFENDANT

MEMORANDUM OPINION

Presently before the court is the motion of the defendant, Thomas Lighting ("Thomas"), for the entry of summary judgment with regard to the plaintiff's claims at bar. Finding that the motion is well taken as to the plaintiff's claims arising under federal law, the court shall grant the motion as to those claims. Further, as the plaintiff concedes his claim arising under state law, the court shall grant the defendant's motion as to that claim.

I. Background

The factual background in this matter appears to be without substantial dispute between the parties. Thomas hired the plaintiff in April of 1981, and the plaintiff worked there continuously until the termination of his employment on November 11, 1996.

On that date, November 11, 1996, the defendant Thomas terminated the plaintiff's employment for violation of its work attendance policy.

The plaintiff is also a sergeant in the Mississippi Army National Guard and has served in the National Guard for at least eighteen years. As a part of his duties in the National Guard, the plaintiff is required to attend military training sessions at various times during the year. On three dates in particular - April 12, October 18 and November 1, 1996 - the plaintiff attended scheduled training sessions with his unit in Nettleton, Mississippi. On each of these dates, the plaintiff was required to report to his unit in Nettleton at 5:30 p.m. These Fridays were also days that the plaintiff was scheduled to work at Thomas. His scheduled shift at Thomas was to be completed by 3:30 p.m. on each of these days. On both April 12 and October 18, the plaintiff failed to arrive at work at all. On November 1, 1996, the plaintiff came to work but left at 11:30 a.m. Thomas

counted all three of these days against the plaintiff in making the decision to fire him for absenteeism.

Thomas has now moved this court for the entry of summary judgment on the plaintiff's claims. In his submission to this court, the plaintiff concedes his claim arising under state law. Plaintiff's Response Brief, p. 7 ("[I]t is clear that facts do not support a cause of action under Mississippi law. Therefore, Plaintiff withdraws said claim and does not dispute Thomas' contention that this claim should fail as a matter of law."). Therefore, the court shall enter judgment for Thomas on this claim of the plaintiff. All that remains for consideration by this court is the plaintiff's claim arising under the Uniformed Services Employment and Reemployment Rights Act ("USERRA").

II. Discussion

A. Summary Judgment Standard

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden rests upon the party seeking summary judgment to show the district court that an absence of evidence exists in the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986); see Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996); Hirras v. Nat'l R.R. Passenger Corp., 95 F.3d 396, 399 (5th Cir. 1996). Once such a showing is presented by the moving party, the burden shifts to the non-moving party to demonstrate, by specific facts, that a genuine issue of material fact exists. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986); Texas Manufactured Housing Ass'n, Inc. v. City of Nederland, 101 F.3d 1095, 1099 (5th Cir. 1996); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). Substantive law will determine what is considered material. Anderson, 477 U.S. at 248; see Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996). "Only disputes over facts that might affect the outcome of the suit under the governing

law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099; Gibson v. Rich, 44 F.3d 274, 277 (5th Cir. 1995). Further, "[w]here the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue of fact for trial." Anderson, 477 U.S. at 248; see City of Nederland, 101 F.3d at 1099. Finally, all facts are considered in favor of the non-moving party, including all reasonable inferences therefrom. See Anderson, 477 U.S. at 254; Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187, 1198 (5th Cir. 1995); Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994). However, this is so only when there is "an actual controversy, that is, when both parties have submitted evidence of contradictory facts." Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994); Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996); Richter v. Merchants Fast Motor Lines, Inc., 83 F.3d 96, 97 (5th Cir. 1996). In the absence of proof, the court does not "assume that the nonmoving party could or would prove the necessary facts." Little, 37 F.3d at 1075 (emphasis omitted); see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888, 111 L. Ed. 695, 110 S. Ct. 3177 (1990).

B. The Uniformed Services Employment and Reemployment Rights Act ("USERRA")

The plaintiff's primary claim in this cause is that Thomas terminated his employment in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), 38 U.S.C. § 4301, *et seq.* Enacted in 1994[1], USERRA prohibits employment discrimination on the basis of military service. 38 U.S.C. § 4301 et seq. (Supp.1997). USERRA provides in relevant part:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

[1]USERRA replaced the Veterans' Reemployment Rights Act ("VRRA") on October 13, 1994. USERRA was enacted to "clarify, simplify, and where necessary, strengthen the existing veterans' employment and re-employment rights provisions" of the former Veterans Re-employment Rights Act. H.R. Rep. No. 65, 103d Cong., 2d Sess. 19 (1994), reprinted in 1994 U.S.C.C.A.N. 2449, 2451.

38 U.S.C. § 4311(a). USERRA further provides that "[a]n employer may not discriminate in employment against or take any adverse employment action against any person because such person . . . has exercised a right provided for under this chapter." 38 U.S.C. § 4311(b).

An employer violates USERRA in denying an employment benefit if an employee's "membership . . . or obligation for service in the uniformed services is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership . . . or obligation for service." 38 U.S.C. § 4311(c)(1). To carry his burden of proving a *prima facie* case of unlawful discrimination, thereby triggering the defendant's duty to show it would have terminated the plaintiff anyway, the plaintiff must ultimately show by a preponderance of the evidence that his membership or participation in the National Guard was a "substantial or motivating factor" in the adverse employment decision against him. Gummo v. Village of Depew, N.Y., 75 F.3d 98, 106 (2nd Cir.1996), *cert. denied*, --- 533 U.S. ---, 116 S.Ct. 1678, 134 L.Ed.2d 780 (1996); Palmatier v. Michigan Dept. of State Police, 981 F. Supp. 529 (W.D. Mich. 1997); Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F. Supp. 571, 575 (E.D. Tex. 1997); see also NLRB v. Transportation Management Corp., 462 U.S. 393, 401, 103 S.Ct. 2469, 2474, 76 L.Ed.2d 667 (1983). Once the plaintiff meets his burden with regard to a *prima facie* case, the burden then shifts to the defendant to demonstrate that the adverse employment decision would have been taken even in the absence of the plaintiff's protected status, *e.g.*, military service. Transportation Management, 462 U.S. at 401, 103 S.Ct. at 2474; Gummo, 75 F.3d at 106.

This court turns, then, to whether the plaintiff has presented sufficient evidence to create a genuine issue of material fact with regard to a *prima facie* case. One essential matter that the plaintiff must demonstrate in this cause is that he was engaged in a protected activity under USERRA that would trigger its protections. In this cause, the plaintiff asserts that the time taken off by him on April 12, October 18 and November 1, 1996, was required of him by virtue of his military service. The question for this court is whether the plaintiff was "performing military service," *i.e.*, engaging in a protected activity, when absent from work on April 12, October 18 and November 1, 1996.

Under USERRA,

> (13) the term "service in the uniformed services" means *the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority* and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, and a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty.

38 U.S.C. § 4303(13) (emphasis added).

Obviously, the time spent on duty during an actual weekend drill with the National Guard constitutes the performance of military service. On each of these particular dates, however, the plaintiff was not required to report for duty until at least 5:30 p.m. Mr. Smith did not, therefore, take time off his employment with Thomas for active drill duty on the dates in question.

However, travel would be required in order for the plaintiff to arrive for duty in a timely fashion. In the opinion of this court, the statute must as a matter of necessity encompass protection for time taken off from work for travel to and from armed services duty. Sawyer v. Swift & Co., 610 F. Supp. 38, 40 (D. Kan. 1985) ("The statute obviously contemplated that substantial time might be necessary to travel from one's place of employment to the location for . . . training.") (interpreting precursor statute 38 U.S.C. § 2024(d)). Such required travel would therefore constitute the performance of military duty as contemplated under USERRA. In this case, the time taken by the plaintiff cannot appropriately be classified as travel time. The undisputed proof is that the plaintiff's work was at most only a thirty minute drive from his duty station at Nettleton, Mississippi. In light of the plaintiff's work shift ending each day by 3:30 p.m. and his drill duty not starting until at least 5:30 p.m., there appears to be no dispute that the time taken on these days does not constitute protected travel time.

The only remaining inquiry, then, is whether the plaintiff's preparation for duty during these time periods constitute protected performance of military service under USERRA. The proof presented by the plaintiff is that

> he is required, as are all national guardsmen, to report in a state of full readiness, proper haircut, uniforms laundered and packed, boots shined, and gear in proper working order.

Exhibit "E" to Plaintiff's Response, Affidavit of Sgt. Steven Morphew ¶ 7. Further, "National

guardsmen are not allowed to conduct personal business in IDT training or Active Duty Training." Id. at ¶ 8. While there does not appear to be any proof before the court regarding precisely what the plaintiff did on these dates, he has intimated that he took care of personal errands that he would not be able to attend to while at on duty with the National Guard. Exhibit "C" to Plaintiff's Response, Deposition of Jerry Smith ("I have things to do on Fridays when I have guard duty. I got bills to pay and get around and make my rounds before I get home and get my gear and get up to the National Guard.").

There is no evidence, however, that the plaintiff was required by the military to make these preparations or perform his personal business during his scheduled hours of employment with the defendant Thomas. Likewise, there is no proof that he could be classified as "on duty" in any form for any of these preparations. Even though the plaintiff may have been required to appear for military duty "in a state of readiness," there is no evidence that anything prevented the plaintiff from preparation the night before or during the after-work hours on the days before he was required to appear for duty. In short, it was not the plaintiff's "duty" to make these preparations to the exclusion of his employment schedule at Thomas. The only evidence before the court is that he chose to make his preparations during employment hours to the exclusion of his free time.

Therefore, it is the opinion of this court that the activities for which the plaintiff charges he was terminated do not constitute "the performance of duty . . . in a uniformed service" protected by USERRA. The plaintiff is incapable of establishing a *prima facie* case in the matter at bar and the defendant is entitled to the entry of a judgment as a matter of law. There is no genuine issue of material fact as to this matter and therefore the defendant's motion shall be granted.

III Conclusion

While this court believes that it should construe USERRA in such a manner as to effectuate its intended purpose[2], the undersigned does not believe that this court is required to make such a

[2] USERRA was enacted by Congress:

(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

strained interpretation as that proffered by the plaintiff in this cause. This court cannot say, based upon the evidence before the court, that there is any genuine issue of material fact regarding whether the plaintiff is capable of establishing a *prima facie* case under USERRA in the matter at bar. The defendant's motion for summary judgment shall be granted and the plaintiff's claims dismissed.

A separate order in accordance with this opinion shall issue this day.

This the ____ day of August 1998.

United States District Judge

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

38 U.S.C. § 4301.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JERRY SMITH — PLAINTIFF

vs. — Civil Action No. 1:97cv239-D-D

THOMAS LIGHTING, a division of
Thomas Industries Holdings, Inc. — DEFENDANT

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT AND
ORDER OF FINAL JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

1) the defendant's motion for the entry of summary judgment on its behalf is hereby GRANTED;

2) the plaintiff's claims are hereby DISMISSED;

3) this case is CLOSED.

All memoranda and other matters considered by this court in granting the defendant's motion for summary judgment are hereby incorporated by reference and made a part of the record in this cause.

SO ORDERED, this the _____ day of August 1998.

_____
United States District Judge

This court finds that the utilization of the venerable burden shifting analysis of McDonnell-Douglas v. Green is appropriate for use in the analysis of the plaintiff's *prima facie* case. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973); Novak v. Mackintosh, 919 F. Supp. 870, 878 (D. S. D. 1996) (applying McDonnell-Douglas to VRRA claim). Use of this analysis requires the plaintiff to come forward with evidence sufficient to create a genuine issue of material fact on the following elements of his *prima facie* [3]case:

1. the plaintiff engaged in a protected activity, *i.e.*, performance of service in a uniformed military service;

2. the plaintiff suffered an adverse employment decision; and
3. a causal connection exists between the plaintiff's protected activity and the adverse employment decision.

See, e.g., Grimes v. Texas Dept. of Mental Health and Mental Retardation, 102 F.3d 137, 140 (5th Cir. 1996) (Title VII retaliation case); Long v. Eastfield College, 88 F.3d 300, 304 (5th Cir.1996) (same); Dollis v. Rubin, 77 F.3d 777, 781 (5th Cir. 1995) (same).

[3] The undersigned recognizes that the *prima facie* case is not static, and may vary upon the facts of each case. McDonnell-Douglas, 411 U.S. at 800, 93 S.Ct. at 1823 ("The facts necessary will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect in differing factual situations."); Thornbrough v. Columbus & Greenville R. Co., 760 F.2d 633, 641 (5th Cir.1985) ("The necessary elements of a *prima facie* employment discrimination case are not Platonic forms, pure and unchanging; rather, they vary depending upon the facts of a particular case."). The plaintiff's claim in this case appears most analogous to that of a retaliation scenario rather than a claim merely based upon the plaintiff's membership in the military. The alleged protected activity in this case is that of preparation for regular drill with the National Guard. Plaintiff's Complaint ¶ VIII (charging that defendant disciplined plaintiff as "a direct result of [plaintiff's] participation and the duties required of him by the Army Reserves.").